STATEMENT OF
COMMISSONER JESSICA ROSENWORCEL
DISSENTING

Re: *Expanding Flexible Use of the 3.7 to 4.2 GHz Band,* GN Docket No. 18-122

Re: *Auction of Flexible-Use Service Licenses 3.7-3.98 GHz Band for Next-Generation Wireless Services, Comment Sought on Competitive Bidding Procedures for Auction 107*, AU Docket No. 20-25

In the United States we have a mid-band spectrum problem that is threatening to slow our ability to build faster 5G wireless networks.

That is a fact that is universally recognized. It's the result of a few forces. For starters, so much of our mid-band airwaves are already used by government agencies or commercial services. That's not true in many other parts of the world where this spectrum has been less broadly deployed and can more easily be repurposed for next-generation wireless networks. In fact, more than two dozen countries have made significant progress in making mid-band airwaves the core of early 5G service and are reaping the benefits. But the United States has fallen behind because instead tackling our own mid-band shortage, we've spent the last three years bringing high-band airwaves to market with a series of auctions of the 24, 28, 37, 39, and 47 GHz bands.

That's why last year I warned in *WIRED* that the Federal Communications Commission needs to pivot from its exclusive focus on high-band spectrum to mid-band airwaves. After all, if we don't the world will move on without us. Why? Because our efforts to date with high-band airwaves at the expense of mid-band spectrum are misguided. High-band airwaves have substantial capacity, but their signals do not travel far. As a result, commercializing them is costly—especially in rural areas. The sheer volume of antenna facilities required to make this service viable will limit deployment to the most populated urban areas. That means our early 5G spectrum policy has only deepened the digital divide.

Along the way, we had no shortage of opportunities to address this problem. We could have held an incentive auction of spectrum in the 2.5 GHz band. We could have held an auction of the 3.5 GHz band early instead of delaying it three years for picayune policy changes. We could have moved faster on our unlicensed proposals in the 5.9 GHz band which have been kicking around this agency for seven years. But we did not. We refused to acknowledge there was even a problem. And when this agency made shortsighted decisions about mid-band spectrum, I called them out.

So now we have today's decision. In this proceeding, the FCC finally accepts what is obvious: we have reached the point where we need to fix our mid-band spectrum problem. We finally recognize our 5G future depends on getting this right. That's the good news.

The not-so-good news is that the C-band may be among the most challenging slices of spectrum that the FCC has ever taken up. It has unique features that were not on congressional radar when this agency was given authority to repurpose spectrum. You can start with the fact that existing incumbents in the 3.7-4.2 GHz band share the full 500 megahertz at the same time. Plus, millions of households across the country rely on this spectrum to receive a wide range of television and radio programming. All of this means that the traditional tools available to us won't work.

With our hands already tied, the FCC tries to fix this problem the wrong way. Specifically, the FCC proposes to clear the C-band for 5G by sunsetting existing operations by 2025 and then offering incumbent satellite operators the option to accelerate their transition in exchange for their reasonable

relocation costs—as much as $5.2 billion—plus a $9.7 billion accelerated relocation payment. Then the FCC proposes to hold a public auction of overlay licenses for new flexible use, including 5G.

There are three things that are fundamentally wrong with this proposal.

First, this decision is wrong on the law. Section 309(j) of the Communications Act sets forth the procedures for this agency to hold a spectrum auction. It requires that all deposits the FCC may require to bid in an auction, as well as all proceeds from the use of an auction, are deposited in the United States Treasury. Consistent with this rule, under the FCC's tried-and-true *Emerging Technologies* framework, the agency may require new entrants to privately negotiate with incumbents and pay their reasonable relocation expenses. This very specific framework has not only been used in the past, it has been blessed by courts that have reviewed our auction proposals.

But that's not the framework we adopt here no matter how this decision tries to dress it up and say otherwise. The *Emerging Technologies* framework is a voluntary and market-based approach to spectrum clearing. It offers new licensees the option to pay for faster access and capitalizes on the fact that a new entrant has better information about the value of relocation and an incumbent has better information about the cost. This asymmetry of information creates incentives for parties to engage in strategic bargaining, increasing the likelihood that a fair and efficient agreement can be reached.

However here, with a legal sleight of hand, the FCC takes what must be voluntary and makes it mandatory. We force C-band auction winners to pay nearly $10 billion to incumbent satellite operators over and above their relocation costs. There is no cite to any legal authority or precedent that allows us to do so.

Moreover, we pluck that amount of payment out of thin air in a manner that does not reflect how market transactions work. That puts what we do here fundamentally at odds with both the *Emerging Technologies* framework and Section 309(j). Indeed, where Congress previously authorized the FCC to require similar payments in the context of an incentive auction, it required the agency to use a competitive reverse auction to facilitate price discovery and then give forward auction participants the choice to pay it.

Nor do we square our decision with the court's finding in *Teledesic LLC v. FCC* that any voluntary incentive payment must be proportionate to the cost of providing replacement facilities. There is no attempt here to explain how the acceleration payment is tied at all to facilitating access to the C-band—beyond placating the largest incumbents.

All of this means that this decision forces auction winners to make an arbitrary payment that reduces the proceeds the government would otherwise realize at auction. Again, this is not what the *Emerging Technologies* framework permits. It's not what is contemplated in Section 309(j) of the Communications Act. The FCC has no legal authority to require any payments to incumbents that extend beyond actual and reasonable relocation costs. Remember that Section 309(j) is explicit that all deposits the FCC may require at auction, as well as all proceeds from the auction, must flow to the United States Treasury. The FCC tries to get around this requirement by suggesting it can create a third category of auction-related payments that are not deposits or proceeds. But by doing so, the FCC is reducing revenues that statutorily must go to the Treasury and is undermining congressional power of the purse. Indeed, if we accept the FCC's argument, it is hard to imagine any limitation on the agency's ability to require payments for any purpose that even loosely can be connected to some spectrum-related goal as a condition of auction participation—and that simply cannot be the case. As a result, it is flat out disingenuous to suggest that authority to make this so-called acceleration payment is established in the *Emerging Technologies* framework. Because it is not.

Second, this decision is wrong on the economics. Comb through this decision and you will not find a rational basis for the nearly $10 billion we are set to give away in this repurposing of the C-band. It's not the result of data-driven decision-making. At best, it's back-of-the envelope math. It looks a lot like an effort to justify backroom deals and promised payoffs. That's not the kind of decision a federal agency should be making. That's a question more appropriately answered by Congress or the markets.

What is most disappointing is that just over a year ago the FCC launched a new Office of Economics and Analytics to tackle the hardest issues before us—just like here with the C-band. A key objective of this office, we were told, was providing independent economic analysis to inform the agency's decisions. But in the first real test of this office's abilities—this proceeding—the economics experts are nowhere to be found.

That's too bad, because it would have been nice to know what they thought about all of the issues raised in this proceeding. Here's an example. Early in the decision, the agency discusses the calculation of the benefits associated with an accelerated transition. We cite one economist who says that for every year of delay in making C-band available, consumer welfare is reduced by $15 billion. Another estimates that one year of delay would reduce the value of repurposing the C-band from seven to eleven percent. But we do no analysis ourselves.

Next, the FCC tackles the relocation costs of the transition. It ticks through all the best guesses in the record. The C-Band Alliance estimates that the total cost to clear 300 megahertz in the contiguous United States would be $2.8 billion. Eutelsat estimates $3.5 billion. ACA puts the number closer to $6.1 billion. So what does the office we set up to do this analysis think? We don't know. Because instead of doing the work ourselves we just go halfsies and pick a range in the middle.

We do the same when it comes to predicting the prices that bidders will pay for licenses to operate on this spectrum. We list the best guesses of the Public Interest Spectrum Coalition, the Brattle Group, the C-Band Alliance, Kerrisdale Capital Management, and American Action Forum and then pick $0.50 per MHz-pop—because we say it is in the middle. We do no analysis of our own.

Finally, its hard to square our economic analysis with our decision to dismiss pre-auction aggregation limits, which could limit 5G competition in the future. Likewise, the performance obligations are divorced from the economic reality that they can be a tool to facilitate faster and more widespread 5G deployment. In fact, we only require carriers to build out this spectrum to 45 percent of the population within 8 years. Good luck with rural deployment because that does not suggest a whole lot of urgency.

Third, this decision is wrong on policy. With today's action the FCC substitutes its will for the will of Congress. By acting unilaterally this the agency is not only exceeding its authority under the law, it is denying the legislative branch the ability to produce a statute that gets us where we want to go on 5G and mid-band spectrum. It also denies us all the ability to take the funds from the auction of these public airwaves and put them to broader public purpose than those contemplated in the existing statute.

Working with Congress we can use the billions of dollars in revenues this auction could raise to do the very infrastructure projects this country so desperately needs.

And what might those involve?

We could start with using this auction as a vehicle for Congress to repeal the provision in the Middle Class Tax Relief and Job Creation Act that requires the FCC to auction off T-band spectrum one year from now. This auction will jeopardize the communications of police and fire officials in New York,

Philadelphia, Pittsburgh, Washington, Chicago, Dallas, Houston, Los Angeles, San Francisco, Boston, and Miami. We should be looking for every implement in our policy toolkit to help prevent this public safety mess, including support from the revenues associated with this spectrum auction.

Next, we could use the billions of dollars raised in auction revenue to do other big things. We could do audacious things. We could start a fund a new initiative to help with rural broadband. We could fund the nation's transition to next-generation 911, which is sorely needed and would benefit public safety in every state. Or we could use some of the revenues to seed a Homework Gap Trust Fund to help our nation's students stuck in the digital divide. It could support wi-fi hotspots for loan in every school library—and virtually eliminate the Homework Gap overnight.

But because we act now, we handicap the funding Congress could secure and risk discounting the value of this auction in the eyes of the Congressional Budget Office. We deny Congress its rightful role setting auction policy. Plus we take a pass on what is truly needed—a legislative overhaul of our system for incentivizing the return of airwaves and the repurposing of the them for a future where we can lead in 5G. For all of these reasons, I dissent.